



October 7, 2016

DEPARTMENT OF HEALTH & HUMAN SERVICES
Division of Medicaid Expansion Demonstrations
Centers for Medicare & Medicaid Services
7500 Security Boulevard
Baltimore, Maryland 21244-1850

Comments Opposing Kentucky HEALTH Section 1115 Waiver Application

Dear Sir or Madam:

These comments are submitted to the Centers for Medicare & Medicaid Services on behalf of Kentucky Equal Justice Center's Employment Law Project (KEJC). KEJC is a non-profit organization with offices in Louisville and Lexington. We are a multi-issue poverty law center and advocacy organization, providing direct legal services and advocating on behalf of low income Kentuckians. While some of my KEJC colleagues may also submit comments on behalf of our organization based on their respective areas of expertise and experiences, my focus on employment law and policy for low-income Kentuckians is the focus of my narrowly drawn comments.

Summary of Legal and Policy Concerns

In these brief comments, I hope to show that:

- Under the current Medicaid expansion, working Kentuckians have benefitted but risk reduction in coverage if program is scaled back through a waiver approval.
- The proposed work-related activities required to maintain enrollment could constitute "work" under the Fair Labor Standards Act and Kentucky Wage and Hour Law, requiring payment of at least minimum wage for any hours worked.

Kentucky Workers in Low Wage Sectors Gained Coverage Through Medicaid Expansion

According to the Kentucky Center on Economic Policy (KCEP), many Kentuckians who gained coverage through the 2014 Medicaid expansion were already working in low wage jobs.¹ Available Census data showed that these workers are employed in food service, construction, temporary work and retail. These workers totaled more than 73,800 low-wage Kentucky workers made income eligible through the expansion. This figure represents more than half of the 137,220 adults who gained Medicaid coverage in 2014. If that figure is a reliable measure for all who gained Medicaid coverage through the expansion, over 200,000 of the 400,000 enrolled would be working Kentuckians.

KCEP found the workers who gained healthcare coverage through expansion in 2014 came most commonly from these sectors:

- Restaurant and food services-14,620 workers covered. In 2013, 58 percent of that industry's workers were uninsured, compared with only 25 percent in 2014 ¹.
- Construction-5,920 workers covered. The uninsured rate that fell from 63 percent to 32 percent.
- Temp agencies-4,690 workers covered and uninsured rate fell from 68 percent to 25 percent.

While this data shows that the majority of the adults who have gained coverage are working at least one low wage job, it also shows that they are not in jobs that offer them affordable coverage. This data refutes, in part, inferences in the Kentucky HEALTH application (p. 12) that employment and community engagement are further needed for this population to achieve and sustain health.

The Kentucky HEALTH application also does not indicate how it will be helping those who need it find the required volunteer work, employment, caretaking, job training, or job search activities. At least one non-profit group has come forward publicly to state that Kentucky's non-profit organizations could not handle the influx of approximately 200,000 forced volunteers.² As a non-profit attorney for a small organization that works often with Spanish-speaking clients, the training and specialized knowledge that would be needed to work with attorneys or multi-cultural clients would be a steep learning curve.

¹ See Jason Bailey, "Many Kentucky Workers Have Gained Insurance through the Medicaid Expansion, Are at Risk If Program Is Scaled Back." Kentucky Center on Economic Policy (Nov. 10, 2015). Available at: <http://kypolicy.org/many-kentucky-workers-have-gained-insurance-through-the-medicaid-expansion-are-at-risk-if-program-is-scaled-back/>.

² See John Cheves, "Bevin's proposed Medicaid changes could give nonprofits unwanted 'volunteers'." Lexington Herald-Leader, (Aug. 17, 2016). Available at: <http://www.kentucky.com/news/politics-government/article96232057.html>.

Forced Volunteerism and Employment Requirements Could Violate Federal and State Minimum Wage Standards

All workers engaged in employment must receive at least the federal minimum wage of \$7.25 an hour for all hours worked under the Federal Fair Labor Standards Act, 29 U.S.C. § 201 *et seq* (“FLSA”). Kentucky follows the federal minimum wage, and the cities of Louisville and Lexington have adopted local minimum wage increases. KRS § 337.275. Louisville’s minimum wage is currently \$8.25, and Lexington’s minimum wage is \$8.20.

The FLSA’s minimum wage requirements are a fundamental labor protection. Enacted in 1938, the FLSA established a minimum wage and overtime compensation for each hour worked in excess of 40 hours in each workweek. §6(a)(1); 7(a)(3). An employer who violated these provisions could be held civilly liable for backpay, liquidated damages, and attorney’s fees. But the FLSA did not define “work” or “workweek,” and the U.S. Supreme Court has interpreted those terms broadly. It defined “work” as “physical or mental exertion (whether burdensome or not) controlled or required by the employer and pursued necessarily and primarily for the benefit of the employer and his business.” *Tennessee Coal, Iron & R. Co. v. Muscoda Local No. 123*, 321 U. S. 590, 598 (1944). Similarly, it defined “the statutory workweek” to “includ[e] all time during which an employee is necessarily required to be on the employer’s premises, on duty or at a prescribed workplace.” *Anderson v. Mt. Clemens Pottery Co.*, 328 U. S. 680, 690–691 (1946).

Minimum wage rules under FLSA are applicable unless they fit into one of the narrowly-described exceptions to the Act. There is no statutory exemption for workers receiving public benefits. Kentucky law generally follows the statutory exemptions outlined in the FLSA and cites to the FLSA in several sections. The U.S. Supreme Court’s decision in *Walling v. Portland Terminal Co.*, 330 U.S. 148 (1947), may also be helpful to this analysis. It outlines under what circumstances a worker, student or trainee can perform duties without pay. According to the United States Department of Labor’s interpretation, the following circumstances do not require minimum wage pay:

1. The training is similar to that which would be given in a vocational school (even if it includes actual operation of the employer’s facilities);
2. The training is for the benefit of the trainees;
3. The trainees do not displace regular employees;
4. The employer providing the training derives no immediate advantage from the trainees’ activities, and on occasion his operations may be impeded;
5. The trainees are not necessarily entitled to a job at the completion of the training period, and
6. The employer and the trainees understand that the trainees are not entitled to wages for the time spent in training.³

With the broad definition of “work” and narrow list of circumstances exempting minimum wage pay, the also broad employment and “volunteer” requirements of the Kentucky HEALTH waiver will almost certainly require Medicaid recipients to receive pay. This mandate leaves our non-

³ Further explanation of these criteria available at:

https://www.dol.gov/whd/opinion/FLSANA/2004/2004_05_17_05FLSA_NA_internship.htm.

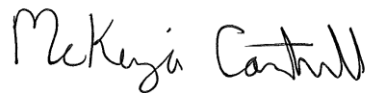
profit organizations left to choose between their legal obligations and the health eligibility of a low income Kentuckian.

Other employment-related laws are implicated by the Kentucky HEALTH waiver that are designed to ensure that wage requirements and safety standards are met, but perhaps none are more fundamental than our minimum wage. The United States Department of Labor may be willing to discuss these complex implications with CMS and HHS during its evaluation of the waiver.

Conclusion

Kentucky should be promoting policies that incentivize work and community engagement, but the Kentucky HEALTH application does not show how forcing volunteerism on its most vulnerable populations will improve health or further the goals of the Medicaid program. Many workers who benefitted from the initial Medicaid expansion are already working in low wage jobs in Kentucky's retail and service industries. Any uncompensated work required to maintain enrollment would leave Kentucky's non-profit organizations, and quite possibly Kentucky governmental agencies, liable for wage and hour violations. For the reasons stated in these comments, I urge the federal government to deny Kentucky's application for a Section 1115 waiver to the extent that its community engagement initiative violates longstanding federal employment law. Thank you for your consideration of these comments in evaluating this proposal.

Sincerely,

A handwritten signature in black ink that reads "McKenzie Cantrell". The signature is written in a cursive, flowing style.

McKenzie Cantrell
Employment Law Attorney
Kentucky Equal Justice Center